



City of Hampton, Virginia
Ordinance - Coded

22 Lincoln Street
Hampton, VA 23669
www.hampton.gov

File Number: 07-0259

Enactment Number: -

AN ORDINANCE TO AMEND AND REENACT CHAPTER 41.1 OF THE CODE OF THE CITY OF HAMPTON, VIRGINIA ENTITLED "WETLANDS", EFFECTIVE JULY 1, 2007.

Chapter 41.1

WETLANDS*

ARTICLE I.

IN GENERAL

* **Cross References:** General building and development regulations, Ch. 9; excavating, filling and similar operations, Ch. 13.

State Law References: Fisheries and habitat of tidal waters, Code of Virginia, § 28.2-100 et seq.

Article I. In General

Sec. 41.1-1. **Intent.**
Sec. 41.1-2. **Exemptions from this chapter.**

Article II. Wetlands Board

Sec. 41.1-3. **Wetlands board generally.**
Sec. 41.1-3.1. **Officers, meetings, rules, etc., of wetlands board.**
Sec. 41.1-4. **Removal of member of wetlands board.**

Article III. Wetlands Zoning Ordinance

Division 1. Permits

Sec. 41.1-5. **Adopted.**
Sec. 41.1-6. **Definitions.**
Sec. 41.1-7. **Permitted uses and activities.**
Sec. 41.1-8. **Required; application generally.**
Sec. 41.1-9. **Public inspections of application.**
Sec. 41.1-10. **Public hearing on application.**
Sec. 41.1-11. **Grant or denial of permit generally.**
Sec. 41.1-12. **Review or appeal of board's action on application.**
Sec. 41.1-13. **Bond securing compliance with conditions and limitations; suspension or revocation of permit.**
Sec. 41.1-14. **Factors to be considered in making decision as to grant or denial.**
Sec. 41.1-15. **Permit.**
Sec. 41.1-16. **Permit expiration and extension.**

Sec. 41.1-17. Does not affect zoning and land use ordinances.

Division 2. Enforcement

Sec. 41.1-18. Enforcement officer.

Sec. 41.1-19. Investigations and prosecutions.

Sec. 41.1-20. Reporting, site inspections, and notice to comply, wetlands board to issue stop work order or restoration order.

Sec. 41.1-20.1. Violations; penalty.

Sec. 41.1-21. Injunctions.

Sec. 41.1-22. Penalties.

ARTICLE I.

IN GENERAL

Sec. 41.1-1. Intent.

The intent of this chapter is to comply with chapter 13 of title 28.2 of the Code of Virginia (Code of Virginia, § 28.2-1300 et seq.) providing protection to tidal wetlands located within the confines of the City of Hampton.
(Ord. No. 1104, 9-22-93)

Sec. 41.1-2. Exemptions from this chapter.

- (a) Nothing in this chapter shall affect:
 - (1) Any project in vegetated wetlands commenced prior to July 1, 1972, or any project in nonvegetated wetlands commenced prior to January 1, 1983; however, this section shall not be deemed to exclude from regulation under this chapter any activity which expands or enlarges upon a project already in existence or under construction at the time of such date, except for those activities exempted under section 41.1-7(8).
 - (2) Any project or development in vegetated wetlands for which, prior to July 1, 1972, or in nonvegetated wetlands for which, prior to January 1, 1983, a plan or plan of development thereof has been filed pursuant to ordinance or other lawful enactment with either an agency of the federal or state government or with either the planning commission or city council.
 - (3) Any project or development in vegetated wetlands, whether commenced prior to July 1, 1972, and in nonvegetated wetlands, whether commenced prior to January 1, 1983, if located or to be located in whole or in part on ground or in an area an interest in which was authorized by the General Assembly to be conveyed prior to July 1, 1972, for vegetated wetlands and July 1, 1982, for nonvegetated wetlands.

(b) For exemptions (1) and (2) as set out in subsection (a) above to be effective the project or development must be certified as exempt by the Commission or the wetlands board. The request for certification must be filed prior to January 1, 1984. Projects or developments which have been determined by the Commission or the wetlands board prior to July 1, 1982, to be exempt from the provisions of this chapter shall be considered to be certified. If the request for certification is not granted or denied within one hundred twenty (120) days from receipt of the request by the Commission or the wetlands board, the certification will be conclusively presumed to have been granted. The time limitations and public hearing requirements imposed by section 28.2-1302 of the Code of Virginia shall not apply to the certification process. Upon request by any person holding a certification issued by the Commission or the wetlands board, the clerk of the circuit court having jurisdiction over the property on which the certified project is located shall record such certification in the appropriate deed book of the circuit court. (Ord. No. 1104, 9-22-93)

ARTICLE II.

WETLANDS BOARD

Sec. 41.1-3. Wetlands board generally.

The wetlands board of the city is hereby created, consisting of five (5) residents of the city appointed by the city council. All board members' terms shall be for five (5) years. The chairman of the board shall notify the city council at least thirty (30) days prior to the expiration of any member's term and shall promptly notify the city council if any vacancy occurs. Vacancies shall be filled by the city council without delay upon receipt of such notice. Appointments to fill vacancies shall be for the unexpired portion of the term. Members may serve successive terms. A member whose term expires shall continue to serve until his successor is appointed and qualified. Members of the board shall hold no public office in the city other than membership on the local planning or zoning commission, the local erosion commission, the local board of zoning appeals, a board established by the city to hear cases regarding ordinances adopted pursuant to the Chesapeake Bay Preservation Act (Code of Virginia, § 10.1-2100 et seq.) and regulations promulgated thereunder, or as director of a soil and water conservation board. When members of these local commissions or boards are appointed to the wetlands board, their terms of appointment shall be coterminous with their membership on those boards or commissions. The city council shall also appoint one (1) alternate member to the board. The qualifications, terms, and compensation of the alternate member shall be the same as those of other members. Any member who knows that they will not be able to attend a board meeting shall notify the chairman at least twenty-four (24) hours in advance of such meeting. The chairman shall notify the alternate member to serve in place of the absent member at the board meeting, which shall be noted in the records of the board. (Ord. No. 1104, 9-22-93; Ord. No. 1386, 10-27-04)

State Law References: Similar provisions, Code of Virginia, § 28.2-1303.

Sec. 41.1-3.1. Officers, meetings, rules, etc., of wetlands board.

The board shall annually elect from its membership a chairman and such other officers as it deems necessary for terms of one year. For the conduct of any hearing and the taking of any action, a quorum shall be not less than three (3) members. The board may make, alter and rescind rules and forms for its procedures, consistent with state law and local ordinances. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the city council at least once each year. The board shall forward a copy of its report to the Commission.

(Ord. No. 1104, 9-22-93)

State Law References: Similar provisions, Code of Virginia, § 28.2-1304.

Sec. 41.1-4. Removal of member of wetlands board.

Upon a hearing with at least fifteen (15) days' notice thereof, any board member may be removed for malfeasance, misfeasance or nonfeasance in office, or for other just cause, by the city council.

(Ord. No. 1104, 9-22-93)

State Law References: Similar provisions, Code of Virginia, § 28.2-1303.

ARTICLE III.

WETLANDS ZONING ORDINANCE*

* **Cross References:** General zoning ordinance, App. A.

State Law References: Authority of city to adopt Wetlands Zoning Ordinance as set out in this article, Code of Virginia, § 28.2-1302.

DIVISION 1.

PERMITS

Sec. 41.1-5. Adopted.

The Hampton city council, acting pursuant to chapter 13 of title 28.2 of the Code of Virginia (Code of Virginia, § 28.2-1302), for purposes of fulfilling the policy standards set forth in such chapter, adopts this chapter regulating the use and development of wetlands.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-6. Definitions.

As used in this Chapter, unless the context requires a different meaning:

Commission means the Virginia Marine Resources Commission.

Commissioner means the commissioner of Marine Resources.

Governmental activity means any or all of the services provided by this city to its citizens for the purpose of maintaining this city including, but not limited to, such services as constructing, repairing and maintaining roads, providing sewage facilities and street lights; supplying and treating water; and constructing public buildings.

Nonvegetated wetlands means unvegetated lands lying contiguous to mean low water and between mean low water and mean high water.

Person means any individual, corporation, partnership, association, company, business, trust, joint venture or other legal entity.

Vegetated wetlands means lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half (1 1/2) times the mean tide range at the site of the proposed project in this city and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass (*Distichlis spicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* spp.), sea lavender (*Limonium* spp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica* sp.), sea oxeye (*Borrchia frutescens*), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*), southern wildrice (*Zizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo (*Nyssa aquatica*), dock (*Rumex* spp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), smartweed (*Polygonum* sp.), arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*) or switch grass (*Panicum virgatum*).

Wetlands means both vegetated and nonvegetated wetlands.

Wetlands board or *board* means a board created pursuant to section 28.2-1303 of the Code of Virginia.
(Ord. No. 1104, 9-22-93)

Sec. 41.1-7. Permitted uses and activities.

The following uses of and activities in wetlands are authorized if otherwise permitted by law:

- (1) The construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters, fences, duckblinds, wildlife management shelters, footbridges, observation decks and shelters and other similar structures, provided that such structures are so constructed on pilings as to

permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands;

- (2) The cultivation and harvesting of shellfish, and worms for bait.
- (3) Noncommercial outdoor recreational activities, including hiking, boating, trapping, hunting, fishing, shellfishing, horseback riding, swimming, skeet and trap shooting, and shooting on shooting preserves, provided that no structure shall be constructed except as permitted in subsection (1) of this section;
- (4) Other outdoor recreational activities, provided they do not impair the natural functions or alter the natural contour of the wetlands;
- (5) Grazing, haying and cultivating and harvesting agricultural, forestry or horticultural products;
- (6) Conservation, repletion and research activities of the commission, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries and other conservation-related agencies;
- (7) The construction or maintenance of aids to navigation which are authorized by governmental authority;
- (8) Emergency measures decreed by any duly appointed health officer of a governmental subdivision acting to protect the public health;
- (9) The normal maintenance and repair of, or addition to, presently existing roads, highways, railroad beds or facilities abutting on or crossing wetlands, provided that no waterway is altered and no additional wetlands are covered;
- (10) Governmental activity in wetlands owned or leased by the Commonwealth or a political subdivision thereof; and
- (11) The normal maintenance of man-made drainage ditches, provided that no additional wetlands are covered. This subdivision does not authorize the construction of any drainage ditch.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-8. Required; application generally.

(a) Any person who desires to use or develop any wetland within this city, other than for the purpose of conducting the activities specified in section 41.1-7, shall first file an application for a permit directly with the wetlands board or with the commission.

- (b) The permit application shall include the following:
- (1) The name and address of the applicant;
 - (2) A detailed description of the proposed activities;
 - (3) A map, drawn to an appropriate and uniform scale, showing the area of wetlands directly affected; the location of the proposed work thereon; the area of existing and proposed fill and excavation; the location, width, depth and length of any proposed channel and the disposal area; and the location of all existing and proposed structures, sewage collection and treatment facilities, utility installations, roadways and other related appurtenances or facilities, including those on adjacent uplands;
 - (4) A description of the type of equipment to be used and the means of equipment access to the activity site;
 - (5) The names and addresses of owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice;
 - (6) An estimate of cost;
 - (7) The primary purpose of the project;
 - (8) Any secondary purposes of the project, including further projects;
 - (9) The public benefit to be derived from the proposed project;
 - (10) A complete description of measures to be taken during and after the alteration to reduce detrimental offsite effects;
 - (11) The completion date of the proposed work, project or structure; and
 - (12) Such additional materials and documentation as the wetlands board may require.

(c) A nonrefundable processing fee of three hundred fifty dollars (\$350.00) shall accompany each permit application. In the case of an after-the-fact permit application, the fee shall be three hundred fifty dollars (\$350.00).
(Ord. No. 1104, 9-22-93; Ord. No. 1392, 3-23-05)

Sec. 41.1-9. Public inspection of application.

All applications, maps and documents submitted shall be open for public inspection at the office of the Codes Compliance Department as specified in the advertisement for public hearing required under section 41.1-10 of this article. (Ord. No. 1104, 9-22-93)

Sec. 41.1-10. Public hearing on application.

Not later than sixty (60) days after receipt of a complete application, the wetlands board shall hold a public hearing on the application. The applicant, Hampton City Council, commissioner, owner of record of any land adjacent to the wetlands in question, known claimants of water rights in or adjacent to the wetlands in question, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries, the Water Control Board, the Department of Transportation and any governmental agency expressing an interest in the application shall be notified of the hearing. The board shall mail these notices not less than twenty (20) days prior to the date set for the hearing. The wetlands board shall also cause notice of such hearing to be published at least once a week for two (2) weeks prior to such hearing in the newspaper of general circulation in this city. The public notice shall specify the place or places within the city where copies of the application may be examined. The costs of publication shall be paid by the applicant.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-11. Grant or denial of permit generally.

Approval of a permit application shall require the affirmative vote of three (3) members of the board. The chairman of the board or, in his absence, the acting chairman may administer oaths and compel the attendance of witnesses. Any person may testify at the public hearing. Each witness at the hearing may submit a concise written statement of his testimony. The board shall make a record of the proceeding, which shall include the application, any written statements of witnesses, a summary of statements of all witnesses, the findings and decision of the board and the rationale for the decision. The board shall make its determination within thirty (30) days of the hearing. If the board fails to act within that time, the application shall be deemed approved. Within forty-eight (48) hours of its determination, the board shall notify the applicant and the commissioner of its determination. If the board fails to make a determination within the thirty-day period, it shall promptly notify the applicant and the commission that the application is deemed approved. For purposes of this section, "act" means taking a vote on the application. If the application receives less than three (3) affirmative votes, the permit shall be denied.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-12. Review or appeal of board's action on application.

If the board's decision is reviewed or appealed, the board shall transmit the record of its hearing to the commissioner. Upon a final determination by the commission, the record shall be returned to the board. The record shall be open for public inspection in the offices of the Codes Compliance Department.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-13. Bond securing compliance with conditions and limitations; suspension or revocation of permit.

The board may require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing to the city compliance with the conditions and limitations set forth the permit. The board may, after a hearing held pursuant to this article, suspend or revoke a permit if the applicant has failed to comply with any of the conditions or limitations set forth in the permit or has exceeded the scope of the work as described in the application. The board may, after hearing, suspend a permit if the applicant fails to comply with the terms and conditions set forth in the application.
(Ord. No. 1104, 9-22-93)

Sec. 41.1-14. Factors to be considered in making decision as to grant or denial.

In fulfilling its responsibilities under this article, the board shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation.

- (1) In deciding whether to grant, grant in modified form or deny a permit, the board shall consider the following:
 - a. The testimony of any person in support of or in opposition to the permit application;
 - b. The impact of the proposed development on the public health, safety and welfare; and
 - c. The proposed development's conformance with standards prescribed in section 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to section 28.2-1301 of the Code of Virginia.
- (2) The board shall grant the permit if all of the following criteria are met:
 - a. The anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment;
 - b. The proposed development conforms with the standards prescribed in section 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to section 28.2-1301 of the Code of Virginia; and

c. The proposed activity does not violate the purposes and intent of this ordinance or chapter 13, section 28.2-1300 et seq. of title 28.2 of the Code of Virginia.

- (3) If the board finds that any of the criteria listed in subsection (2) of this section are not met, the board shall deny the permit application but allow the applicant to resubmit the application in modified form.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-15. Permit.

The permit shall be in writing, signed by the chairman of the board or his authorized representative, and notarized. A copy of the permit shall be transmitted to the Commissioner.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-16. Permit expiration and extension.

No permit shall be granted without an expiration date established by the board. Upon proper application, the board may extend the permit expiration date.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-17. Does not affect zoning and land use ordinances.

No permit granted by a wetlands board shall in any way affect the applicable zoning and land use ordinances of this city or the right of any person to seek compensation for any injury in fact incurred by him because of the proposed activity.

(Ord. No. 1104, 9-22-93)

DIVISION 2.

ENFORCEMENT

Sec. 41.1-18. Enforcement officer. The Director of Codes Compliance shall designate a member of his staff as the Wetlands Board Staff Coordinator and a different member of his staff as the Enforcement Officer.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-19. Investigations and prosecutions.

Wetlands boards may investigate all projects, whether proposed or ongoing, which alter wetlands located within their jurisdiction. Wetlands boards may prosecute all violations of their orders and any violation of the wetlands zoning ordinance.

(Ord. No. 1104, 9-22-93)

Sec. 41.1-20. Reporting, site inspections and notice to comply; wetlands board to issue stop work order or restoration order.

(a) The board chairman may require a permittee to implement monitoring and reporting procedures he believes are reasonably necessary to ensure compliance with the provisions of the permit and this chapter. The board chairman may require such on-site inspections as deemed reasonably necessary to determine whether the measures required by the permit are being properly performed or whether the provisions of this chapter are being violated. Prior to conducting such inspections, the board chairman shall provide notice to the resident owner, occupier or operator who shall be given an opportunity to accompany the site inspector. If it is determined that there is a failure to comply with the permit, the board chairman shall serve notice upon the permittee at the address specified in his permit application or by delivery at the site of the permitted activities to the person supervising such activities and designated in the permit to receive the notice.

The notice shall describe the measures needed for compliance and the time within which such measures shall be completed. Failure of the person to comply within the specified period is a violation of this section.

(b) Upon receipt of a sworn complaint of a substantial violation of this chapter from the designated enforcement officer, the board chairman may, in conjunction with or subsequent to a notice to comply as specified in subsection (a) of this section, issue an order requiring all or part of the activities on the site to be stopped until the specified corrective measures have been taken. In the case of an activity not authorized under this chapter or where the alleged permit noncompliance is causing, or is in imminent danger of causing, significant harm to the wetlands protected by this chapter, the order may be issued without regard to whether the person has been issued a notice to comply pursuant to subsection (a) of this section. Otherwise, such an order may be issued only after the permittee has failed to comply with the notice to comply. The order shall be served in the same manner as a notice to comply and shall remain in effect for a period of seven (7) days from the date of service pending application by the enforcing authority, permittee, resident owner, occupier or operator for appropriate relief to the Circuit Court of the City of Hampton. Upon completion of corrective action, the order shall immediately be lifted. Nothing in this section shall prevent the board chairman from taking any other action specified in section 41.1-19.

(c) Upon receipt of a sworn complaint of a substantial violation of this chapter from the designated enforcement officer, the wetlands board may order that the affected site be restored to predevelopment conditions if the board finds that restoration is necessary to recover lost resources or to prevent further damage to resources. The order shall specify the restoration necessary and establish a reasonable time for its completion. The order shall be issued only after a hearing with at least thirty (30) days' notice to the affected person of the hearing's time, place and purpose, and shall become effective immediately upon issuance by the board. The board shall require any scientific monitoring plan they believe necessary to ensure that such project result in the successful re-establishment of wetlands protected by this chapter and may require that a prepaid

contract acceptable to the board be in effect for the purpose of carrying out the scientific monitoring plan. The board may also require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it securing to the city compliance with the conditions set forth in the restoration order. The circuit court upon petition by the board, may enforce any such restoration order by injunction, mandamus or other appropriate remedy. Failure to complete the required restoration is a violation of this chapter.

(d) The duties of the board chairman under this section may be delegated to his designee; however, such designee shall not be a designated enforcement officer.
(Ord. No. 1104, 9-22-93)

Sec. 41.1-20.1. Violations; penalty.

Any person who knowingly, intentionally or negligently violates any order, rule or regulation of the wetlands board established pursuant to this chapter, any provision of this chapter or of the wetlands zoning ordinance, or any provision of a permit granted pursuant to this chapter, is guilty of a Class 1 misdemeanor. Following a conviction, every day the violation continues is a separate offense.
(Ord. No. 1104, 9-22-93)

Sec. 41.1-21. Injunctions.

Upon the petition of the wetlands board to the circuit court where any act is done or threatened which is unlawful under this chapter, the circuit court may enjoin the unlawful act and order the defendant to take such steps necessary to restore, protect and preserve the wetlands involved. This remedy shall be exclusive of and in addition to any criminal penalty which may be imposed under section 41.1-20.1.
(Ord. No. 1104, 9-22-93)

Sec. 41.1-22. Penalties.

(a) Without limiting the remedies which may be obtained under this chapter, any person who violates any provision of this chapter or who violates or fails, neglects or refuses to obey any wetlands board notice, order, rule, regulations or permit condition authorized by this chapter shall, upon finding by circuit court, be assessed a civil penalty not to exceed twenty-five thousand dollars (\$25,000.00) for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the City of Hampton for the purpose of abating environmental damage to or restoring wetlands therein in such a manner as the court may, by order, direct; except that where the violator is the city itself, or its agent, the court shall direct the penalty to be paid into the state treasury.

(b) Without limiting the remedies which may be obtained under this chapter, and with the consent of any person who has violated any provision of the chapter or who has violated or failed, neglected or refused to obey any wetlands board order, rule,

regulation or permit condition authorized by this chapter, the wetlands board may provide, in an order issued by the wetlands board against such person, for the one-time payment of civil charges for each violation in specific sums, not to exceed ten thousand dollars (\$10,000.00) for each violation. Civil charges shall be in lieu of any appropriate civil penalty which could be imposed under subsection (a) of this section. Civil charges may be in addition to the cost of any restoration ordered by the wetlands board. (Ord. No. 1104, 9-22-93)

(c) All funds collected pursuant to Section 41.1-22(b) shall be placed into the special revenue account created pursuant to Section 33.1-8.1 of the City Code and used solely for the purposes set forth in that section.

This Ordinance will be effective July 1, 2007.

Adopted at the regular meeting of the City Council of the City of Hampton, Virginia held on _____ to be effective on July 1, 2007.

Signed by _____ **Date** _____
Ross A. Kearney, II, Mayor

Attested by _____ **Date** _____
Katherine K. Glass
Clerk of the Council